



Scottish Information
Commissioner
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Decision Notice 235/2026

Status of common good land

Authority: Dumfries and Galloway Council
Case Ref: 202502318

Summary

The Applicant asked the Authority for information in relation to the status of areas of specific common good land affected by the Whitesands Flood Protection Scheme. The Authority withheld information falling within the scope of the request on the basis that it comprised internal legal advice. During the investigation, the Authority changed position and stated that it did not hold any information falling within the scope of the request. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position. He required the Authority to carry out fresh, adequate and proportionate searches and provide the Applicant with a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner” and “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 18 September 2025, the Applicant made a request for information to the Authority in relation to the areas of common good land at Whitesands and Greensands in Dumfries, affected by the Whitesands Flood Protection Scheme. Among other things, he requested:

- (i) Confirmation of whether the Authority had petitioned the Court under section 75(2) of the Local Government (Scotland) Act 1973 in relation to the appropriation or change of use of that land.
 - If yes, please provide copies of the pleadings, interlocutors, or orders.
 - If no, please provide the documentary basis for not seeking such a petition.
- 2. The Authority responded on 17 October 2025. It confirmed that no application had been made to the Court under section 75(2) of the Local Government (Scotland) Act 1973 and that the basis of not doing so was legal advice received from its internal Legal Services. It withheld “the documentary evidence” under the exception in regulation 10(4)(e) of the EIRs.
- 3. On 26 October 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he did not agree that the Authority was entitled to withhold the information requested.
- 4. The Authority notified the Applicant of the outcome of its review on 24 November 2025, fully upholding its original decision.
- 5. On 16 December 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review because he disagreed that the Authority was entitled to withhold the information requested.

Investigation

- 6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
- 7. On 6 March 2026, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant.
- 8. The Authority informed the Commissioner that it appeared to have erred in stating it was withholding information under the exception in regulation 10(4)(e) of the EIRs and that it should instead have confirmed that it did not hold the information requested and relied on the exception in regulation 10(4)(a).
- 9. The case was subsequently allocated to an investigating officer.
- 10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions, related to how it established whether it held any information relevant to the request.

Commissioner’s analysis and findings

- 11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

12. Where information falls within the scope of the definition of “environmental information” in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
13. Having considered the terms of the request and the nature of the information requested, the Commissioner accepts the decision of the Authority to deal with the request under the EIRs rather than under FOISA.
14. The Applicant did not challenge the Authority’s decision to deal with the request as one for environmental information. The Commissioner will therefore consider this case solely under the EIRs.

Regulation 5(1) – Duty to make available environmental information on request

15. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
16. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) of the EIRs requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
17. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

The Authority’s change of position

18. At both initial response and review stage, the Authority stated that it was withholding information falling within the scope of the request under the exception in regulation 10(4)(e) of the EIRs.
19. During the investigation, the Authority informed the Commissioner that it appeared to have erred in stating it was withholding information under the exception in regulation 10(4)(e) of the EIRs and that it should instead have confirmed that it did not hold the information requested and relied on the exception in regulation 10(4)(a).
20. The Authority explained that, while the 2014 proposal was deemed sound, it did not hold a specific written legal briefing addressing that point for the areas specified in the request. It stated that this did not mean that advice was not given, but simply that no document matching the description requested was traceable, existed or was held in the Authority’s records.
21. The Commissioner considers it a basic requirement, when responding to an information request, that a public authority first establishes what information falling within the scope of the request is held. Only once that information has been identified can the public authority properly consider whether an exception applies to it.
22. The Commissioner cannot see how a public authority can reach a properly considered decision on either the application of an exception or the balance of the public interest without first establishing what information is held and considering its content.

23. Given that the Authority's position now is that it does not hold the information requested, the Commissioner will consider whether it was entitled to rely on the exception in regulation 10(4)(a) of the EIRs.

Regulation 10(4)(a) – Information not held

24. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when it received the request.
25. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
26. The Commissioner also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.
27. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information (or holds no more information than it has identified and located in response to the request). In this case, notwithstanding the opportunity given to provide comments, the Commissioner is not satisfied that the Authority has achieved this.
28. Where a public authority submits that it does not hold information, evidence of the authority's searches will usually be a key consideration during the Commissioner's investigation. As a minimum, authorities should be able to provide the Commissioner with the following information:
- (i) details of the records or locations which were searched;
 - (ii) why these were the relevant records and locations;
 - (iii) the keywords used;
 - (iv) which staff were involved and why they were considered relevant;
 - (v) the outcome of the searches;
 - (vi) evidence that the searches have been carried out.
29. During the investigation, the Commissioner asked the Authority specific questions regarding the searches it had undertaken to establish whether it held any relevant information falling within the scope of the Applicant's request and for evidence of these searches.
30. In response, the Authority stated that it had not carried out any searches because it was "known by the service that no such information was held", "the service was comfortable that this was not information which was held", the Governance and Assurance Manager had confirmed the information was not held and it had "no reason to believe the information should be held".

31. In very limited circumstances, the Commissioner may be prepared to accept an assurance from a public authority that information is not held (e.g. where there was no reasonable expectation that the authority would hold the information requested).
32. In this case, at both initial response and review stage, the Authority withheld the information requested under the exception in regulation 10(4)(e) of the EIRs. Plainly, there was a level of belief or expectation within the Authority that it held information relevant to the request because it purported to withhold that information under the exception in regulation 10(4)(e) of the EIRs. The Commissioner also notes that the Authority appears to consider it at least possible that relevant advice was given (see paragraph 20 above).
33. In all the circumstances, therefore, the Commissioner cannot uphold the Authority's claim, based on the submissions he has been provided, that it does not hold the requested information and cannot find that the Authority was entitled to rely on regulation 10(4)(a) of the EIRs in this case. He is therefore not required to go on to consider the application of the public interest test in regulation 10(1) of the EIRs.
34. The Commissioner requires the Authority to reconsider the Applicant's request, carry out fresh searches for the information requested, reach a decision on the basis of those searches and notify the Applicant of the outcome (all in terms of regulation 16 of the EIRs). In doing so, the Authority must:
 - take adequate and proportionate steps to establish what information is held, using appropriate search terms and searching all locations and mediums where relevant information may be held
 - retain evidence of those searches in the event of a further appeal to the Commissioner.
35. As part of its revised review outcome, the Commissioner would also urge the Authority to consider providing the Applicant with evidence of the searches it has undertaken, in order to assure him that they were adequate and proportionate. Doing so may obviate the need for a further appeal to the Commissioner, particularly if the Authority maintains (following further searches) that it does not hold any information falling within the scope of the Applicant's request.
36. If the Authority locates information relevant to the Applicant's request as a result of these searches, the Authority is required either to disclose it to the Applicant or to withhold it under an exception.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

In particular, the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs because it failed to demonstrate that it was entitled to rely on the exception in regulation 10(4)(a).

The Commissioner therefore requires the Authority (in terms of regulation 16 of the EIRs) to carry out adequate and proportionate searches for the information requested, reach a decision on the basis of those searches and notify the Applicant of the outcome, by 2 November 2026.

In doing so, the Commissioner requires the Authority to have regard to paragraphs 34 to 36 above.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

17 September 2026